RE AMARJIT KAUR BAKHSHIS SINGH, EX P BSN COMMERCIAL BANK (MALAYSIA) BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[BANKRUPTCY NO: D2-29-1292-1998]
26 SEPTEMBER 2000

BANKRUPTCY: *Notice - Substituted service - Affidavit of service - Whether must be affirmed by person instrumental in effecting advertisement - Whether sufficient to attach advertisement as exhibit to affidavit affirmed by some other person - Companies (Winding-up) Rules 1972, r. 111(1)*

BANKRUPTCY: *Notice - Excessive demand - Validity of notice - Failure to issue notice of intention to oppose on ground of excessive demand - Whether bankruptcy notice may still be disputed on such ground*

BANKRUPTCY: *Notice - Notice of intention to oppose - Failure to issue such notice on ground of excessive demand - Whether bankruptcy notice may still be disputed on ground of excessive demand*

CIVIL PROCEDURE: *Appeal - New points, introduction of - Question of law and of compliance with law - Whether may be raised by way of submission in appeal although not raised earlier*

This was an appeal against receiving and adjudication orders made by the senior assistant registrar. Two issues had to be decided. The first concerned service of the bankruptcy notice and the relevant facts leading thereto were these. The bankruptcy notice was, pursuant to an order of court for substituted service, advertised in a local newspaper. A copy of the advertisement, as it actually appeared in the newspapers, was annexed as an exhibit to an affidavit affirmed by an agent of service of the judgment creditors' solicitors. The judgment debtor contended that to prove service of the bankruptcy notice by affidavit, pursuant to r. 111(1) of the Companies (Winding-up) Rules 1972, the affidavit must be that of the person who was instrumental in effecting the advertisement and that the affidavit of the agent of service in this case, not being the affidavit of such person, should not be accepted as proving service.

The second issue related to the validity of the bankruptcy notice. Specifically, the court had to decide whether the validity of a bankruptcy notice may be disputed on the ground of excessive demand notwithstanding the failure of the judgment debtor to give notice to the judgment creditor of his intention to so dispute, contrary to proviso (ii) to s. 3(2) of the Bankruptcy Act 1967. Counsel for the judgment creditor only raised this requirement of proviso (ii) at the appeal stage.

Held:

[1] The production of the advertisement as it appeared in the newspaper was itself proof of the fact that the petition was advertised in the newspaper. Since the advertisement was exhibited by an affidavit, service of the petition had been proved by affidavit even though the affidavit was not that of the person who was instrumental in effecting the advertisement.

[2] Proviso (ii) to s. 3(2) of the Bankruptcy Act 1967 is very clear and strictly worded. To dispute the validity of the bankruptcy notice on the ground that the amount specified in the notice exceeded the amount actually due, notice to this effect must be given to the judgment creditor within the time allowed for payment, which was seven days after service of the bankruptcy notice as provided by s. 3(1)(i) of the Bankruptcy Act 1967. Otherwise, the bankruptcy notice "shall not be invalidated by reason only" of the mistake of excessive demand. Therefore, since the requirement of the said proviso (ii) for invalidating a bankruptcy notice by reason of a mistake of excessive demand was not satisfied in this case, the bankruptcy notice remained good.

[3] The appeal being by way of a rehearing and the question being purely a question of law, and of compliance with the law, the requirement of the said proviso could be raised in submission in this appeal.

[Appeal dismissed.]

Legislation referred to:
Bankruptcy Act 1967, ss. 3(1)(i), (2)(ii)
Bankruptcy Rules 1969, r. 117
Companies (Winding-up) Rules 1972, rr. 109, 110, 111(1)

For the judgment creditor - Evelina Appaduray; M/s EJ Appaduray & Co
For the judgment debtor - Hari Haran Kuppusamy; M/s Hari Haran & Co

Reported by S Dharmendran

JUDGMENT

Abdul Aziz Mohamad J:

This is an appeal by the judgment debtor against receiving and adjudication orders made against her by the learned senior assistant registrar.

Three issues have been raised in the appeal.

I have already disposed of one issue in favour of the judgment creditors. My reasons are recorded in the notes of proceedings. That issue was as to whether the creditor's petition was served by the solicitors for the judgment creditors in accordance with r. 109 of the Companies (Winding-up) Rules 1972 by "a person in their employment".

Another issue concerns r. 111(1), which says that "Service of the petition shall be proved by affidavit". On 17 July 1999 substituted service of the petition was ordered, as allowed by r. 110. One mode of substituted service that was ordered was by advertising a notice of the petition and of the order for substituted service in a local newspaper. The advertisement duly appeared in the Malay Mail on 19 August 1999. On 25 August 1999 an agent of service of the firm of the judgment creditors' solicitors affirmed by affidavit, *inter alia*, that the solicitors' firm had placed the advertisement in the newspaper. A copy of the advertisement, as it actually appeared in the newspaper, was exhibited.

Learned counsel for the judgment debtor argued that to prove by affidavit, as required by r. 111(1), the advertisement of the petition in the newspaper, and so to prove the service of the petition by that means, the affidavit must be that of the person who was instrumental in effecting the advertisement and that therefore the affidavit of the agent of service in this case, not being the affidavit of such a person, should not be accepted as proving service by advertisement. In my opinion, the production of the advertisement as it appeared in the newspaper is itself proof of the fact that the petition was advertised in the newspaper, and since the advertisement was exhibited by an affidavit, service of the petition has been proved by affidavit even though the affidavit is not that of the person who was instrumental in effecting the advertisement. Given the advertisement's appearance in the newspaper, questions such as who actually prepared it, who sent it to the newspaper, and who, at the offices of the newspaper, saw to it that it was printed are not in issue and are irrelevant as far as proving the fact of the advertisement is concerned.

The remaining issue challenges the validity of the bankruptcy notice on the ground of excessive demand. The bankruptcy notice was issued on 12 May 1998 demanding payment within seven days of a judgment sum of RM55,097.84 due to the judgment creditors as at that date. The judgment debtor was a guarantor. On 31 October 1998 the principal debtor paid the judgment creditors RM20,000 of that sum. The bankruptcy notice was served on the judgment debtor by way of substituted service by posting on the court notice board and advertisement in a newspaper, and that was effected on 2 March 1998. According to the order for substituted service, service would have been duly effected fourteen days after that, on 16 March 1998. The bankruptcy notice, as so served, still demanded payment of RM55,097.84 although RM20,000 had been paid. It was submitted by learned counsel for the judgment debtor that the bankruptcy notice was invalid for demanding payment of a greater sum than was due when it was served.

Learned counsel for the judgment creditors contended that the bankruptcy notice could not be invalidated on that ground and she relied on proviso (ii) to s. 3(2) of the Bankruptcy Act 1967 which provides that a bankruptcy notice "shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake". The time allowed for payment in this case was, as provided in s. 3(1)(i), seven days after service of the bankruptcy notice.

That contention had not been made by the judgment creditors in their affidavit and I have felt some concern that the judgment debtor might, had it been made by affidavit, have wished to aver facts in answer to it, which, as it has not, she has been deprived of the opportunity of averring. The facts that she might have wished to aver might be that, the bankruptcy notice having been served by way of substituted service, she did not actually know of it until the seven days had passed and that, the payment of the RM20,000 not having been made by her, she did not know that the demand in the bankruptcy notice was in excess by that sum until the seven days had passed.

But, on further reflection I think my concern is not justified. The judgment debtor was legally represented. To oppose the petition she filed a notice of intention to oppose in Form No. 16 under r. 117 of the Bankruptcy Rules 1969 and an affidavit in which she set out her grounds for opposing the petition. The question of the mistake of excessive demand was raised in para. 7 of the affidavit. Her solicitors would have known of the requirement of proviso (ii) to s. 3(2) as to giving notice to the judgment creditors within seven days that had to be complied with in order for her to dispute the validity of the bankruptcy notice on the ground of a mistake of excessive demand, so that if she really did have an excuse to offer for her failure to comply with the requirement she would, on her solicitors' advice and with their guidance, have stated the facts in her affidavit.

Moreover, even if the judgment debtor had averred such facts as I have mentioned, in my opinion they would be of no avail because the said proviso (ii) is very clear and is strictly worded. Notice to the creditor must be given within the seven days. Otherwise the bankruptcy notice "shall not be invalidated by reason only" of the mistake of excessive demand. The wording of the proviso disallows the admission of any exception to the requirement of notice within the seven days. As far as service of the bankruptcy notice is concerned, for the purposes of the proviso it must be taken to have been effected on 16 March 1998 and the seven days must be counted from that date. To accept, for the purposes of the proviso, that

the judgment debtor did not have notice of the bankruptcy notice until some later date, and that therefore the bankruptcy notice was only served on that date, would be to deny the substituted service.

I hold, therefore, that since the requirement of the said proviso (ii) for invalidating a bankruptcy notice by reason of a mistake of excessive demand has not been satisfied in this case, the proviso forbids the invalidating for that reason of the bankruptcy notice in this case, and the bankruptcy notice remains good. The liability of the judgment debtor in bankruptcy is, however, as a matter of course reduced by RM20,000.

Learned counsel for the judgment debtor objected to the raising of the requirement of the proviso in this appeal because it had not been raised before the learned senior assistant registrar. In my opinion, the appeal being by way of a rehearing and the question being purely a question of law, and of compliance with the law, it may be raised in submission in this appeal.

I have already mentioned the manner adopted by the judgment debtor to oppose the petition. Before the learned senior assistant registrar a preliminary objection was raised as to the correctness of the manner adopted but was dismissed, and although no appeal had been lodged by the judgment creditors against the dismissal of the preliminary objection, in this appeal, after hearing argument, I allowed learned counsel to raise the procedural points that were involved in the preliminary objection, and submission on the procedural question occupied a good part of the time taken on the appeal. As, however, the judgment debtor does not succeed on any of the three grounds of objection raised in this appeal, I do not need to discuss the procedural question except to say that, after hearing learned counsel for the judgment debtor, I think that, subject to my opinion about compliance with the said proviso (ii), the procedure adopted was right.

I dismiss this appeal with costs.